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NOV 28 2000
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Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

No. 00-836

In the

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR THE STATE OF ALABAMA, THE ATTORNEY GENERAL OF ALABAMA, AND THE SECRETARY OF STATE OF ALABAMA, AS *AMICI CURIAE*, SUPPORTING REVERSAL

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QUESTION PRESENTED

In this Brief, *amici curiae* address the following question:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

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INTEREST OF *AMICI CURIAE*

The State of Alabama, the Attorney General of Alabama, Bill Pryor, and the Secretary of State of Alabama, Jim Bennett, respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.4. *Amici* submit this Brief because of the striking similarities between this case and an Alabama case decided by the United States Court of Appeals for the Eleventh Circuit five years ago, *Roe* v. *Alabama*, involving the counting of unwitnessed absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of decisions from the Eleventh Circuit holding that a post-election change in the procedures for counting absentee ballots violated the First and Fourteenth Amendments, which require state election procedures to be fundamentally fair. *See Roe* v. *Alabama*, 43 F.3d 574 (11th Cir.) ("*Roe I*") (certifying question to Supreme Court of Alabama), *remanded to district court for evidentiary hearing after certified question answered*, 52 F.3d 300 (11th Cir.) ("*Roe II*"), *cert. denied*, 516 U.S. 908, *appeal after remand to district court*, 68 F.3d 404 (11th Cir.) ("*Roe III*"), *stay denied sub nom. Hellums* v. *Alabama*, 516 U.S. 938 (1995). The Petitioner in this case expressly relied upon these decisions of the Eleventh Circuit in requesting review by this Court. *See* Pet. for Cert. at 17–18; 22–26; Pet. App. at 63a–64a. The State of Alabama, by and through its Attorney General, and the Secretary of State of Alabama were defendants in *Roe* v. *Alabama*. *See Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama, then a deputy attorney general, personally represented the State and the current Secretary of State in that litigation. *See Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404; *see also Roe* v. *Mobile County Appointing Bd.*, 904 F. Supp 1316, 1317 (S.D. Ala.), *aff'd sub nom. Roe* v.

Alabama, 68 F.3d 404 (11th Cir.), *stay denied*, 516 U.S. 938 (1995).

Relying on the constitutional principles applied in *Roe* v. *Alabama*, the State of Alabama reformed its election laws to ensure that Alabama courts cannot change the rules for counting absentee ballots after an election. *See* Ala. Code § 17-10-10 (Supp. 2000) ("No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) . . . ."). The Attorney General and Secretary of State have relied on *Roe* v. *Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. *See, e.g.*, Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <http://www.ago.state.al.us/pdfopinions/2000-180.pdf> ("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

Having now relied on the principles of due process applied in *Roe* v. *Alabama* for several years, *amici* have a profound interest in seeing those principles upheld and consistently enforced, especially in the unique context of

the election of the President and Vice President of the United States, in which all States have a profound interest. Accordingly, *amici curiae* file this Brief to address the due-process component of the first question in this case. In so doing, *amici* argue that the judgment of the Supreme Court of Florida must be reversed because that court changed the rules governing the duties of the Secretary of State of Florida, as well as the rules governing election protests and contests in Florida, in violation of due process and 3 U.S.C. § 5 (1994). *Amici* urge this Court to uphold the First and Fourteenth Amendment guarantees of fundamentally fair election procedures so that States may not, after an election, retroactively change their canvassing, certification, and contest procedures to alter the outcome of an election.

SUMMARY OF ARGUMENT

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on whether the procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots after an election to alter the outcome. Fundamental fairness also requires each State to establish — before an election — objective and meaningful standards for counting ballots and adhere to those standards after the election to protect the First and Fourteenth Amendment rights of both voters and candidates. Adherence to these guarantees of fundamental fairness requires special deference to the authority of legislatures to establish rules for counting votes before an election rather than allowing court to create retroactively rules for resolving post-election disputes. Because the decision of the Supreme Court of Florida violated these requirements of due process and

fundamental fairness in the election of the President and Vice President of the United States, this Court should reverse that decision.

ARGUMENT

I. MATERIAL POST-ELECTION CHANGES IN STATE CANVASSING PROCEDURES VIOLATE DUE PROCESS.

This Court has long held that voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). Because the right to vote is so fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). In this context, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554.

In 1995, the United States Court of Appeals for the Eleventh Circuit was called upon to apply these principles in *Roe* v. *Alabama*, a case involving a state circuit court's order to count absentee ballots that had not been properly witnessed or notarized in accordance with state law. The Eleventh Circuit correctly observed in *Roe I* that "federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief

under § 1983 therefore in order." 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry* v. *Baker*, 802 F.2d 1302, 1315 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986), in turn quoting *Welch* v. *McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985), and *Duncan* v. *Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B Sept. 1981), *cert. denied*, 459 U.S. 1012 (1982)). Like the case now before this Court, however, *Roe* was no "garden variety" election dispute. Like this case, the post-election change in election procedures by the state courts raised serious questions about the fundamental fairness of the election process. Because the situation in *Roe* v. *Alabama* was so similar to the present case, *Roe* provides an excellent analytical framework for examining the due process principles at stake in this case.

A. *Roe* v. *Alabama*

Before the November 1994 general election, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I*, 43 F.3d at 578; *Roe III*, 68 F.3d at 406–07 (stating that the district court's findings, which were "supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the outcome of the race for Chief Justice in doubt. *Roe I*, 43 F.3d at 578. As the Court is no doubt aware, the 200 to 300 vote spread in *Roe* was similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of unwitnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama not to count unwitnessed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of not counting unwitnessed absentee ballots would violate the First and Fourteenth Amendments. *Roe I*, 43 F.3d at 579.

On appeal to the Eleventh Circuit, the *Roe* plaintiffs argued that enforcement of the state court order

> would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer that would result in fundamental unfairness and would violate plaintiffs' right to due process of law in violation of the Fourteenth Amendment, and that this violation of the plaintiffs' rights to vote and . . . have their votes properly and honestly counted constitutes a violation of the First and Fourteenth Amendments.

Id. at 580 (internal quotation marks omitted). The *Roe* plaintiffs further argued "that the [state] circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581 (footnotes omitted). The Eleventh Circuit agreed with the *Roe* plaintiffs and determined that departing from Alabama's longstanding policy of not counting

unwitnessed absentee ballots would indeed violate the First and Fourteenth Amendments.

In deciding *Roe I*, the Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." *Id.* "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements . . . . Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.* The court also stated that "had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee." *Id.* at 582 (distinguishing *Partido Nuevo Progresista* v. *Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *post hoc* would upset the legitimate expectations of the voters and candidates — the Eleventh Circuit ruled that complying with the state court's *post hoc* change in election procedures would violate the First and Fourteenth Amendments.

The Eleventh Circuit refused to require the Roe plaintiffs to pursue their claims in state court. *Id.* at 582. The court noted that, under Ala. Code § 17-15-6 (1995), Alabama courts are jurisdictionally barred from deciding statewide election contests. The court concluded that the state legislature, which has exclusive authority to decide

an election contest involving the office of Chief Justice, *see* Ala. Code § 17-15-52 (1995), was an "not an adequate or proper forum for the resolution of the federal constitutional issues presented." *Roe I*, 43 F.3d at 582.

The Court of Appeals did, however, abstain from finally adjudicating the plaintiffs' claims to certify a question to the Alabama Supreme Court asking whether absentee ballots that were not properly notarized or witnessed could nonetheless be counted under Alabama law. *Id.* at 583. The Supreme Court of Alabama, in answering the certified question, affirmed the order of the state circuit court and held that unwitnessed absentee ballots in "substantial compliance" with state law should be counted. *Roe* v. *Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–22 (Ala. 1995).

Within a month of the Alabama Supreme Court's decision, the Eleventh Circuit remanded the case to the district court for trial. *Roe II*, 52 F.3d at 301. The Eleventh Circuit directed the district court specifically to address seventeen factual issues. Chief among these was the question of whether there was an established practice of including or excluding improperly executed absentee ballots in previous elections in Alabama. *Id.* at 302–03. Following *Roe II*, the defendant class of voters who sought to have their unwitnessed absentee ballots counted petitioned this Court for a writ of certiorari. That petition was denied. *Davis* v. *Alabama*, 516 U.S. 908 (1995).

Following a three-day trial, the district court found that "the practice in Alabama prior to the November 8, 1994 election had been uniformly to exclude [improperly executed absentee] ballots." *Roe III*, 68 F.3d at 406–07. Accordingly, the district court concluded the *Roe* plaintiffs were entitled to relief and entered an order directing the Alabama Secretary of State to certify the results of the

Chief Justice and State Treasurer elections without counting unwitnessed absentee ballots. *Id.* at 407. The defendant class of voters that had cast improperly executed absentee ballots then appealed to the Eleventh Circuit. *Id.*

In *Roe III*, the Eleventh Circuit concluded that the district court's findings of fact were "supported overwhelmingly by the evidence." *Id.* The appeals court also reaffirmed its holdings in *Roe I* and *Roe II*. *Id.* at 408. The court again rejected the appellants' plea to abstain and allow the state courts to decide the contested elections for Chief Justice and State Treasurer. The appellants argued, in essence, that state courts should have been given the opportunity to apply the Alabama Supreme Court's opinion in *Roe* v. *Mobile County Appointment Board* and grant them relief by ordering their improperly executed absentee votes to be counted. The Eleventh Circuit, however, rejected this argument, again noting that it was "highly doubtful" that the state courts had jurisdiction to grant such relief given the jurisdictional bar in Ala. Code § 17-15-6. *Id.* The court determined that the Roe plaintiffs had no adequate state forum for the vindication of their federal constitutional claims and promptly affirmed the district court's order. Because time was of the essence, the Court of Appeals directed its clerk to issue the court's mandate instanter.

The defendant class of voters who wanted their improperly executed absentee ballots counted immediately applied for a stay from this Court, and Justice Kennedy granted a temporary stay on October 14, 1995, while this Court considered the matter. The Court then denied the stay application on October 19, 1995. *Hellums* v. *Alabama*, 516 U.S. 938 (1995). Chief Justice

Perry O. Hooper, Sr., was certified as the winner of the 1994 election and sworn into office the next day.

B. The Costs and Consequences of *Roe* v. *Alabama*

Roe v. *Alabama* ended with a reaffirmation of the guarantees of the First and Fourteenth Amendments, as interpreted by this Court, that state election procedures must be fundamentally fair. Unfortunately, however, complete justice was not done because the harm caused by the state circuit court order could not be undone. Because of the state circuit court's order, Chief Justice Hooper was not certified as the winner of the November 1994 election until October 20, 1995. *See* Ala. Rptr., 656–659 So. 2d, at IX n.2. He was sworn in later the same day, more than nine months after he should have taken office on January 16, 1995. *Id.* n.1. As a result of the circuit court's attempt to change the rules for counting ballots after the election, the people of Alabama were deprived of their choice for Chief Justice for more than nine months — one-eighth of his total term of office. The Eleventh Circuit's decision in *Roe* v. *Alabama* could not give those nine months back to the people of Alabama.

What is more, the incumbent Chief Justice, who lost the November 1994 election, "continued in office" during the nine months after his term expired until Chief Justice Hooper was sworn in. *Id.* The State then had to pay salaries to both men for that nine-month period. The litigation itself also cost the State of Alabama hundreds of thousands of dollars.

The process now unfolding in Florida as a result of the change in state law by the Supreme Court of Florida portends different, but perhaps more frightening ills. The process now underway in Florida is undermining public

confidence in the presidency and the Republic itself as voters across the country watch canvassing boards stare at tiny pieces of cardboard to divine whether a voter's "dimpled chad" means the voter wanted to vote for a candidate or decided not to vote at the last minute. If post-election changes to election procedures in Florida are approved by this Court, other states will be flooded with similar post-election litigation. Any disgruntled candidate who loses by a narrow margin will have an incentive to file a protest, argue for a new set of rules, and then keep counting until the votes are "found." Such untoward results are avoided when federal courts uphold the due process requirement that the rules for counting ballots not be changed after the election to alter the outcome.

C. Other Cases Invalidating *Post Hoc* Changes in Election Procedure

Roe represents an extreme example of what can happen when election procedures are changed after an election. The situation in *Roe* was not unique, however. Other circuits have intervened in the name of due process to halt similar, fundamentally unfair *post hoc* changes in election procedures.

In *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit addressed a change in the petition requirements for candidates for alderman in the City of Chicago. The City Board of Election Commissioners applied a new "anti-duplication" rule to disallow voters' signatures on more than one candidate's petition to run for alderman; the Board also disallowed any signatures without a middle initial. *Id.* at 1055. The Seventh Circuit held that the Board's failure to forewarn candidates of these new, rigorous requirements violated due process. *Id.*

In *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit ordered a new election after state election officials handed out absentee ballots that were later voided by the state supreme court after the election. *Id.* at 1078–80. The court observed that federal courts have intervened in state elections where

> the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed.

Id. at 1078.

In *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (*per curiam*), *vacated as moot*, 409 U.S. 816 (1972), the District of Columbia Circuit concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. *Id.* at 570. The court noted that, if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569–70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.*

Finally, in *Duncan* v. *Poythress*, 657 F.2d 691 (5th Cir. Unit B. Sept. 1981), *cert. dismissed*, 459 U.S. 1012 (1982), the former Fifth Circuit held that state officials' refusal to hold a special election to fill a vacancy on the state supreme court in accordance with state law violated due process. *Id.* at 708. The court observed that it could "imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." *Id.* at 704.

These cases underscore that the right to vote, at bottom, is a *federal* right. *See Griffin* v. *Burns*, 570 F.2d at 1077. If a state election procedure is so flawed as to be fundamentally unfair, that process violates due process. Where, as in *Roe* and in this case, a state supreme court materially changes state election procedure after an election has occurred and while votes are still being counted, that change is fundamentally unfair and violates the due process rights of the voters and the candidates.

II. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA VIOLATES DUE PROCESS BY RETROACTIVELY CHANGING FLORIDA ELECTION PROCEDURES.

As was the case in *Roe* v. *Alabama*, the judgment of the Supreme Court of Florida in this case substantially changed Florida election procedures after the election and applied those changes retroactively. A comparison of Florida law prior to the election and the changes imposed by the Supreme Court of Florida illustrates the unfairness of this result. By changing Florida law after the election, the Supreme Court of Florida violated the First and Fourteenth Amendment rights of the Florida voters and the candidates.

A. The Judgment of the Supreme Court of Florida Retroactively Changed Florida Election Procedures.

At the close of an election in Florida, any candidate or voter may file a protest contending that the election returns are erroneous. Fla. Stat. § 102.166(1) (2000). During the protest period, the individual voters may not petition for a manual recount; only a candidate, political committee, or political party may request a manual recount at this time. Fla. Stat. § 102.166(4)(a). Under the original statutory scheme, the protest period ended after seven days, at which time the election was to be certified. Fla. Stat. § 102.111(1) (2000). After the results are certified, an election contest may be filed. Fla. Stat. § 102.168(1) (2000). Any unsuccessful candidate and any voter or taxpayer may file an election contest. Fla. Stat. § 102.112(1). Although an election contest in Florida has no express time constraint, in the instant case, the contest would have to be complete by the December 12 deadline for selecting presidential electors. *See* 3 U.S.C. § 5. Unlike an election protest, an election contest in Florida provides for full factual pleading of all complaints including misconduct on the part of election officials, receipt of illegal votes, and improper rejection of legal votes. Fla. Stat. § 102.112(3).

By ordering the Secretary of State to accept untimely manual recount returns through Sunday, November 26, at 5:00 p.m.,[1] and to include these returns in the certified

[1] The Florida Supreme Court designated Monday, November 27, at 9:00 a.m., as an alternative time should the Secretary of State's office not be open on Sunday. Pet. App. at 38a.

election results, the court fundamentally altered the nature of election protest and contest procedures under Florida law. Pet. App. at 38a. The holding of the Supreme Court of Florida, that "the Secretary [of State] may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal election process," also fundamentally altered the discretion granted to the Secretary of State by the Florida legislature. *Id.* at 37a.

These material changes in Florida election law, which the Supreme Court of Florida applied retroactively, create a fundamentally unfair result. First, the requirement that election results be tabulated within seven days of the election, Fla. Stat. § 102.111, has been eviscerated. The court instead created a new judicial timetable for protesting and contesting election results: It enlarged the statutory protest period from seven days to 19 days and shortened the contest period from 29 days to 16 days. Pet. App. at 38a. Second, where there was no statutory provision for the filing of amended returns, much less late ones, there is now a judicial mandate that the Secretary of State accept such amended returns unless they are so late as to "preclude a candidate, elector, or taxpayer from contesting the certification of the election . . . or . . . by precluding Florida voters from participating fully in the federal electoral process." *Id.* at 37a. Third, by narrowing the time frame within which a contest may be filed, the Florida Supreme Court restricted the ability of unsuccessful candidates and individual voters to challenge the outcome of the election in an election contest based on allegations of misconduct or illegality.

B. The Judgment of the Florida Supreme Court Gives Greater Weight to Votes In Counties Where a Protest Is Filed by Delaying Election Contests Statewide.

By enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Supreme Court of Florida arbitrarily (and retroactively) gave greater weight to votes cast in the counties where protests had been filed by delaying election contests statewide. Under the judicially enlarged protest period, the attendant manual recounts have the effect of placing the votes of the four affected counties under close scrutiny while at the same time denying this scrutiny in the remaining 63 counties where voters must wait for this period to end before they can request that their votes be manually counted as part of an election contest. Only a party or candidate can demand a manual recount in the protest period, Fla. Stat. § 102.166(4)(a), but any voter or tax payer can request manual recounts as part of an election contest to be conducted at the discretion of the circuit judge. *See* Fla. Stat. § 102.168(8).

The votes in the four protest counties were painstakingly examined for 19 days, while those in the remainder of the state will only have the possibility of review for a maximum of 16 days. Thus, the holding of the Supreme Court of Florida has impermissibly given greater weight to votes in the four protest counties than to the votes cast in the rest of the state. "Overweighting and overvaluation of the votes of those living [in a particular area] has the certain effect of dilution and undervaluation of the votes of those living [elsewhere]. . . . Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside,

hardly seems justifiable." *Reynolds* v. *Sims*, 377 U.S. at 563. The judgment of the Supreme Court of Florida favored the counties where protests were filed and diluted the votes from the remainder of Florida in violation of the Due Process Clause of the Fourteenth Amendment.

C. By Changing the Statutory Protest and Contest Periods, the Florida Supreme Court Gave an Unfair Advantage to a Campaign That Chose to "Front-Load" Its Challenges Into the Protest Period.

Under Florida law as it existed at the time of the election, a candidate could reasonably forego requesting a manual recount as part of an election protest because the protest period was so short. The candidate could reasonably choose to save his request for a manual recount until an election contest, where there would be more time. This was particularly true where the contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the candidate the opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3). As is evident from the events of the past few weeks, a manual recount can be an arduous and time-consuming process taking longer than a week — especially in large counties. A candidate who desired such recounts would likely know this and could reasonably decide to wait and request the manual recounts as part of an election contest where there would be more time.

By enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Florida Supreme Court thwarted the reasonable expectations of the candidates and gave a fundamentally unfair advantage to a campaign that chose

to "front-load" its challenges into the protest period. This post-election change benefited the "front-loading" campaign by giving it the majority of the available time for its challenges while reducing the time available to the other campaign to respond in a contest. Had the candidates known that the protest period would have been lengthened, campaign strategies would have taken this into account. *See Roe I*, 43 F.3d at 582; *Brown* v. *O'Brien*, 469 F.3d at 569–70. By retroactively changing the election rules, however, the Supreme Court of Florida deprived the candidates of this opportunity.

D. Counting Improperly Marked Ballots That Were Not Counted in the Past Dilutes The Votes of Those Who Properly Marked Their Ballots.

"A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . ." *Baker* v. *Carr*, 369 U.S. 186, 208 (1962). During this election, the overwhelming majority of Floridians who cast their votes using punch-card ballots did so in accordance with the instructions for properly casting ballots, and those votes were accurately tabulated in keeping with the principles of due process. As noted by the Secretary of State:

> In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out

> the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:
>
> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**
>
> *Id.* When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

Harris Resp. to Pet. for Cert. at 15 n.12. Thus, the requirements for casting a correct vote were well established, had been made available to every voter prior to election day, and were followed by the overwhelming majority of voters.

Changing the rules for counting partially punched ballots in the protest counties after the election would be fundamentally unfair. Allowing certain counties to count so-called "dimpled chads" and stray marks as votes constitutes an arbitrary deviation from election rules and dilutes the weight given to votes that were properly punched and counted. A post-election change in manual recount procedures in one county in Florida similarly dilutes the votes of those who submitted partially punched ballots in counties that did not conduct manual recounts.

Changing the rules for counting partially punched ballots only in the protest counties also dilutes the votes of those whose partially punched ballots are left uncounted in their county's manual recount because their county adheres to its pre-election rules. By ordering the Secretary of State to accept arbitrary, untimely recounts and include them in the certified election results, the Florida Supreme Court sanctioned fundamentally unfair practices and violated due process.

E. By Changing the Statutory Protest and Contest Periods, the Florida Supreme Court Deprived Voters of the Right to Prosecute an Effective Election Contest.

Under Florida law, a voter may file an election contest — but only after the election has been certified at the end of the protest period. Fla. Stat. § 102.112(1). By extending the protest period at the expense of the contest period, the Florida Supreme Court has frustrated individual voters' due process rights to an effective election contest by leaving an inadequate length of time for such a challenge.

The contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the complaining voter or candidate an opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3). As is evident from the events of the past few weeks, a manual recount is an arduous and time-consuming process. Under the original election rules, voters who contested the election would have had 29 days in which to challenge the election and request a manual recount. Under the holding of the Florida Supreme Court, the voters are afforded a mere 16 days,

three days less than the new protest period, and 13 days less than they were entitled to have under Florida law.

Not only has this new judicial timetable prejudiced the rights of voters by greatly restricting the time in which they can pursue a contest, it has also prejudiced any such contest by means of the delay. During the court-ordered delay for election protests, ballots in the protest counties have been repeatedly handled, compromising the physical integrity of the individual ballots. Pet. for Cert. at 5. Thus, evidence material to a contest has been damaged and lost. The Florida Supreme Court's new timetable has, therefore, so prejudiced the voters' due process rights to an effective contest as to constitute a fundamentally unfair result.

F. Counting Partially Punched Ballots Without Clear Standards Attributes Political Speech to Voters Without Their Consent and Dilutes Proper Votes by "Stuffing the Ballot Box."

In *Baker* v. *Carr*, this Court noted that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by . . . a stuffing of the ballot box." 369 U.S. at 208 (citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States* v. *Saylor*, 322 U.S. 385 (1944)). Depending on the location, election officials in Florida are currently divining the will of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. By requiring the Secretary of State to accept the untimely manual recounts and include them in the certified election results, the Florida Supreme Court ordered the acceptance of this standardless procedure and "stuffed the ballot box" in violation of voters' First

Amendment right to freedom of expression and Fourteenth Amendment right to due process.

It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively ... rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment protects the right of our nation's citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.") When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials, left to their individual discretion, will inevitably place political speech in the mouths of those voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a "dimpled chad." If election officials count those indentations as votes, they are "stuffing the ballot box" by putting words into the voters' mouths.[2] The government cannot compel voters to speak when they have chosen to

[2] *See, e.g., United States* v. *Saylor*, 322 U.S. at 388 (holding that electors have the right to have their vote honestly counted and not diluted by stuffing the ballot box).

remain silent. *West Virginia* v. *Barnette*, 319 U.S. 624, 631–41 (1943).

Under the Due Process Clause of the Fourteenth Amendment, voters have the right to have their individual ballots correctly counted and reported. *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963). In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so,[3] they had demonstrated their ability to do so. There was no option on these ballots for "NONE OF THE ABOVE." By correctly selecting candidates in other races and leaving only a "dimpled chad" or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the presidential race. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

In the absence of a clear standard, the divination of these improperly marked ballots ultimately says more about the intent of the election officials than the intent of the voters. To affirm this arbitrary conduct, this Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it

[3] As previously noted, each voter was informed of the correct means of casting a ballot prior to the election.

open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. By impermissibly attributing this political speech to citizens who elected not to vote in a particular race, election officials effectively "stuff the ballot box" and dilute the weight of the votes of those citizens who actually voted in this race. *Cf. Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.

This action has violated the due process rights of those citizens who elected not to vote in this race and expected that their silence would be interpreted as it was intended — as a vote for "NONE OF THE ABOVE." *See Baker* v. *Carr*, 369 U.S. at 208; *United States* v. *Saylor*, 322 U.S. at 388 ("This case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Gray* v. *Sanders*, 372 U.S. at 380 ("The [United States Supreme] Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them . . . correctly counted and reported.' ")(citations omitted). Voters who had second thoughts and left only a "dimpled chad" could reasonably expect, after reading the voting instructions, that their "dimpled chad" would not be counted. Thus, by ordering the Secretary of State to accept the untimely manual recounts and include them in the certified election results, the Florida Supreme Court violated the due process rights of both the voters who clearly selected a presidential candidate and the voters who chose to abstain from casting a vote in the presidential election.

III. BOTH *ROE* V. *ALABAMA* AND THIS CASE ILLUSTRATE THE IMPERATIVE OF LEGISLATIVE, NOT JUDICIAL, SUPREMACY IN ESTABLISHING ELECTION RULES TO ENSURE FUNDAMENTAL FAIRNESS.

Another similarity between the *Roe* litigation and the decision of the Florida Supreme Court is the special need for deferring to the exclusive, constitutional authority of legislative bodies to establish rules for voting before an election rather than allowing courts to create rules for voting to apply retroactively in post-election disputes. In both the *Roe* litigation and this case, the state courts failed to defer to the supremacy of the legislatures with disastrous results. In each case, the legislature also had sought to prevent the judicial chicanery that later occurred. Federal relief then became necessary to fulfill the guarantees of the First and Fourteenth Amendments that state courts not change legislative rules retroactively to alter the outcome of an election.

In the *Roe* litigation, the State's pre-election rules plainly prohibited post-election intervention by the Alabama courts. Indeed, the Alabama Legislature had prohibited judicial intervention in elections in the following extraordinary terms:

> No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of

> chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person; and should any judge or other officer hereafter undertake to fine or in any wise deal with any person for disobeying any such prohibited injunction, process or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the supreme court then sitting, or next to sit, without bond, and such proceeding shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days.

Ala. Code § 17-15-6 (1995) (discussed in *Roe I*, 43 F.3d at 577–78 & n.4; *Roe III*, 68 F.3d at 408–09 & n.7). In the *Roe* context of the election of the Chief Justice, Alabama law also provided that only the state legislature could hear and decide an election contest. Ala. Code §§ 17-15-50 to 17-15-63 (1995) (discussed in *Roe I*, 43 F.3d at 577).

The Eleventh Circuit found these provisions "especially significant in light of the common law of Alabama." *Id.* at 578 n.4. The *Roe* court recognized that Alabama law required strict adherence to legislative rules in an election contest:

> [E]lection contests exist only by virtue of statutory enactment and such statutes are to be strictly construed. [*Groom v. Taylor*, 235 Ala. 247, 178 So. 33 (1938)]. "The right to contest an election is not a common-law right (*Cosby v. Moore*, 259 Ala. 41, 65 So.2d 178 [(1953)]). Elections belong to the political branch of the government, and, in the

> absence of special constitutional or statutory provisions, are beyond the control of judicial power." 29 C.J.S. Elections § 246. Further at § 247 the rule is stated that statutes providing for election contests "should be strictly construed or observed as to those provisions for inaugurating the contest and which are necessary to jurisdiction [citing *Walker v. Junior*, 247 Ala. 342, 24 So. 2d 431 (1945); *Groom*, 235 Ala. 247, 178 So. 33] . . . . An election contest being purely statutory, the courts are limited in their investigation to such subjects as are specified in the statutes. The remedy is not to be extended to include cases not within the language of the statute; and the right of contest is not to be inferred from doubtful provisions."

Roe I, 43 F.3d at 578 n.4 (quoting *Longshore* v. *City of Homewood*, 277 Ala. 444, 446, 171 So. 2d 453, 455 (1965)).

Similarly, this case presents important issues of legislative supremacy in election matters that call into question the fundamental fairness of the decision of the Florida Supreme Court. The ultimate source of that legislative supremacy, of course, is the Constitution, which provides "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors . . . ." U.S. Const. art. II, § 1 (emphasis added). The Constitution does not refer this matter to the entire State government but to the State Legislature alone. Likewise, the National Legislature required, more than a century ago, that any post-election controversy regarding the appointment of presidential electors be resolved "by laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. Representative William Craig Cooper of Ohio explained, in the congressional debate on

this law, that Congress should prevent state judicial mischief in the appointment of presidential electors: "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 Cong. Rec. 47 (Dec. 8, 1886). Congress also provided that in the event of any failure to appoint electors "on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of such state may direct*." 3 U.S.C. § 2 (1994) (emphasis added).

Both the Framers and Congress contemplated that the appointment of presidential electors was to be the exclusive province of state legislatures. "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps, in most cases, of themselves determine it." The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961). As in *Roe*, the judicial usurpation of this state legislative authority by the Supreme Court of Florida violated the Constitution, and its fundamental unfairness must be redressed by the federal judiciary.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

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